

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

**TRANSCRIPT OF MOTION HEARING PROCEEDINGS**

*(Via Zoom Conference)*

BEFORE THE HONORABLE IVAN D. DAVIS,  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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**MORNING SESSION, NOVEMBER 6, 2020**

2 (11:53 a.m.)

3 THE COURTROOM CLERK: The Court calls Civil Action Number  
4 19-cv-1570, Maglula, Ltd. versus Amazon.com, Inc.

5 May we have appearances of counsel starting with the  
6 plaintiff, please.

7 MS. SMITH: Good morning, Your Honor. Morgan Smith on  
8 behalf of Plaintiff Maglula. Also with me from Finnegan are Jeff  
9 Berkowitz, Dave Mroz, Sonja Sahlsten, and Jensen Matthew.

10 THE COURT: Good morning.

11 MR. WILCOX: Good morning, Your Honor. This is Jesse  
12 Wilcox from Desmarais, LLP on behalf of Defendant Amazon. With  
13 me this morning is my colleague Priyanka Dev, also from  
14 Desmarais, LLP, and we also have a client representative from  
15 Amazon, Mr. G. Pie {sp}, who is also on the line.

16 THE COURT: Good morning. This matter is before the  
17 Court based on the plaintiff's motion to compel defendant's  
18 {indiscernible}.

19 The Court's had an opportunity to review the motion and  
20 memorandum in support, the opposition to the motion, the reply to  
21 that opposition.

22 Is there anything that the plaintiff would like to add to  
23 your motion at this time?

24 MS. SMITH: Well, Your Honor, I did want to take the  
25 opportunity, even though it is Amazon's burden to show that the

1 discovery that Maglula seeks in this case should not be provided,  
2 to explain the relevance and the proportionality of the e-mail  
3 discovery that Maglula seeks.

4 Maglula is a small, privately held company based out of  
5 Israel, and it is a pioneer in the field of firearm magazine  
6 loaders. Now, its flagship product is something called the  
7 Maglula magazine loader, and it's been very successful, widely  
8 regarded as a premier product in the field.

9 Now, as is the case with many popular products with great  
10 success, imposters tend to follow, and Maglula discovered that  
11 Amazon was selling counterfeit Maglula products. It notified  
12 Amazon of this problem at least as early as 2016. In the years  
13 that followed there were extensive efforts to try and stop Amazon  
14 from selling these products. Hence, it would appear with this  
15 case, after Maglula's complaints and notification were largely  
16 ignored, we are here and Maglula has alleged claims of  
17 counterfeiting and other IP infringement allegations against  
18 Amazon for {indiscernible} and sale of these products.

19 And, given the various ways that Amazon was involved with  
20 the sale of these products, Maglula has asserted a series of  
21 direct contributory and vicarious liability.

22 Now, for purposes of this motion, which is for Amazon to  
23 produce the documents that are responsive to Maglula's e-mail  
24 search terms, not the search terms that Amazon chose, Maglula  
25 feels that contributory liability are important, and those claims

1 involve whether or not Amazon knew or had reason to know that  
2 what it called Amazon selling partners were engaged in infringing  
3 activities. This is the exact discovery that Maglula seeks via  
4 e-mail.

5 Now, Amazon contends that the e-mail discovery should be  
6 narrowed to Maglula's complaints about Maglula's products at  
7 issue in this case. And again, that is incorrect because of the  
8 nature of Maglula's contributory infringement claims.

9 The discovery that Maglula seeks is broader than that  
10 because it reads on whether or not Amazon knew or had reason to  
11 know that Amazon selling partners were engaged in infringing  
12 activity. For example, Maglula's search terms are designed to  
13 cover counterfeit, which is a count in the complaint, a process  
14 known as [REDACTED]

15 [REDACTED],  
16 and those are designed to ferret out several sources of  
17 information, like did Amazon receive any counterfeiting reports  
18 about Amazon selling partners who also sell Maglula's products,  
19 even if that complaint itself may have been about another  
20 product.

21 If Amazon knows that there's a counterfeiting problem with  
22 respect to Maglula's products, and it also knows that a certain  
23 selling partner is suspected of selling counterfeit products,  
24 Amazon should be connecting those dots. The e-mail discovery is  
25 also targeted to figuring out exactly how Amazon responds to

1 counterfeiting complaints. And, again, [REDACTED]  
2 [REDACTED], these are what the search  
3 terms at issue in this motion are about.

4 It's also related to the serious and widespread  
5 counterfeiting that is on Amazon's website which, again, is  
6 relevant to determining whether or not Amazon knew or had reason  
7 to know that its selling partners were engaging in infringing  
8 activities.

9 As for proportionality, proportionality of discovery is  
10 viewed through the lens of the needs of this case. This case  
11 involves many people at Amazon who have been involved in this  
12 matter, either through communications with Maglula or its counsel  
13 regarding counterfeiting and infringement complaints, or  
14 individuals that we have identified through discovery who were  
15 tasked with investigating and responding to Amazon -- or  
16 Maglula's infringement complaint, largely via e-mail. It is  
17 apparent from the discovery that we have that Amazon employees  
18 rely on e-mail as a means of investigating and responding to  
19 these complaints. That's why we're seeking -- we sought e-mail  
20 discovery on this topic.

21 So, through that lens, analyzing the proportionality of  
22 Maglula's requested e-mail search terms, it's clear that the  
23 discovery is proper in this case. The issue that --

24 THE COURT: That's one key factor in that regard.  
25 Proportionality is based on two key things really, the cost

1 benefit analysis, whether the cost benefit goes to money  
2 involved, the cost benefit goes to the amount of information that  
3 may be acquired to support the claims or defenses. If the cost  
4 is you search 5 million e-mails and the benefit is that you get 2  
5 e-mails in response that would support one element of one claim,  
6 that's disproportionate. If you're asking for \$250,000 and your  
7 discovery request requires the opposing party to expend  
8 \$2.5 million to get you that information, that's  
9 disproportionate.

10 MS. SMITH: Certainly, and that is not the situation that  
11 we have here. There are at stake, essentially, millions of  
12 dollars in statutory damages in this case, and the search terms  
13 that are at issue in this motion, given the information that  
14 Amazon provided in its opposition, are returning, I believe,  
15 67,000 documents. What's not clear to me from the information  
16 that Amazon provided is whether or not those documents have been  
17 reduplicated against the various custodians they were propounded  
18 on. One -- for example, two custodians on one e-mail, Amazon  
19 would not be reviewing that e-mail twice. Or, if those documents  
20 have been reduplicated against the documents that Amazon has  
21 already searched. So, if a document hit on one or more of our  
22 search terms but Amazon has already reviewed those documents --  
23 it's not clear to me whether the 67,000 are unique documents  
24 specifically for the search terms that are the subject of this  
25 motion. So what I --

1                   THE COURT: Why not?

2                   MS. SMITH: Because they have not said so.

3                   THE COURT: Did you ask?

4                   MS. SMITH: We did not have the numbers until the morning  
5 of the filing of this motion.

6                   THE COURT: You mean this morning?

7                   MS. SMITH: They gave us the accounts for these search  
8 terms last Friday.

9                   THE COURT: And so, after you received them, I'm sure  
10 you -- last Friday you had these same questions that you said  
11 you're unclear about now. So, what you did, once you received  
12 the hit count, was to get on the telephone and ask these  
13 particular questions of them and got particular answers, correct?  
14 Because that's what -- Parties seem to confuse what the local  
15 rule actually means when it comes to good faith meet and confer.

16                   Simply because a motion has been filed doesn't mean the  
17 parties stop conferring, because a good faith meet and confer  
18 could result in the fact that an opposition and replies don't  
19 need to be filed and the motion could be withdrawn. That's  
20 called judicially efficient.

21                   MS. SMITH: Certainly, Your Honor --

22                   THE COURT: And so the answer to my question is no, that  
23 didn't occur?

24                   MS. SMITH: I did not ask that question. Now, Amazon's  
25 e-mail's response to me was also clear that they will not accept

1 any narrowing of the terms at issue in this motion if they are  
2 not tied to Maglula's complaints about Maglula's products, and we  
3 are --

4 THE COURT: That's an unsupportable position legally.

5 MS. SMITH: And that is Amazon's position.

6 THE COURT: Did Amazon consider that factor in your  
7 response?

8 MS. SMITH: I'm sorry?

9 THE COURT: Did Amazon consider that factor in your  
10 response to your argument? You may continue.

11 MS. SMITH: I don't know if they did, Your Honor.

12 THE COURT: No, I'm telling them now, while you're  
13 speaking, to be considering what the Court just said in forming  
14 their response to your argument.

15 MS. SMITH: Understood. Thank you, Your Honor. Now, I do  
16 want to go back to, again, the process of the analysis that you  
17 were talking about and looking at the proportionality factors,  
18 right? We have millions of dollars at issue in this case. The  
19 issues at stake are of great importance to Maglula. They involve  
20 Amazon's proliferation of counterfeit Maglula products. It  
21 impacts Maglula's business, its brands, as well, and it also  
22 impacts the consumer public at large, people who have tried to  
23 order these products, what they thought were genuine products,  
24 and have been receiving counterfeits.

25 THE COURT: Well, we can shorten that argument. Their

1 whole basis for determining "is not proportionate" is based on  
2 their belief that the information you're requesting is not as  
3 relevant as you believe it is to support your claims, period.  
4 That's their argument. Why do you believe they're wrong?

5 MS. SMITH: Sure. The information that we seek is  
6 relevant because -- the relevant information in this case is not  
7 limited to Maglula's complaints about Maglula's products. Again,  
8 the standard for a contributory liability analysis is going to  
9 involve considering whether or not Amazon had reason to know that  
10 its selling partners were engaged in infringing activity.

11 Responsive --

12 THE COURT: {Indiscernible}. Now we get to proof of  
13 proportionality, because Maglula already has some information to  
14 support that claim, because you informed them of that fact when  
15 you found out that they were allegedly, and their partners were  
16 allegedly continuing to make and/or sell counterfeit Maglula  
17 products on the Amazon site, correct? And then they continued,  
18 including the department, after said notification from Maglula  
19 continued to offer them for sale on Amazon. So, you already have  
20 some information to support that claim. So, the real question  
21 boils down to how much more information do you need to satisfy or  
22 successfully support your claim in front of the trier of fact?  
23 Simply because you believe, well, the more the merrier, that's  
24 not how we deal with proportionality. If you can have 20  
25 documents and 20 documents will more than be enough to satisfy

1 your obligation to represent your client and be successful at  
2 trial, then 20 or 30 documents is appropriate. It doesn't mean,  
3 simply because there may be a million, that you have a right to  
4 seek in discovery all million.

5 MS. SMITH: And we're --

6 THE COURT: That's proportionality.

7 MS. SMITH: Sure, and we're not seeking a million  
8 documents, Your Honor. Again, the number that I believe is at  
9 issue here is 67,000 e-mails, and for a company of Amazon's size  
10 and resources, I do not think that is an overly burdensome task.

11 THE COURT: Answer this for me. Why do counsel a lot like  
12 to talk about the number of documents produced? Like that's  
13 really all that important. I mean, let's start with just the  
14 fact that it's not even clear, because 67,000 documents could be  
15 67,000 pages or it could be 5 million pages, depending on the  
16 size of each document. 67,000 documents, the smoking gun could  
17 be in three documents, which means 64,997 of the documents aren't  
18 even relevant.

19 MS. SMITH: It could be, Your Honor. I think that,  
20 however, though, if you look at the e-mails that Amazon actually  
21 selected and filed in connection with its opposition to this  
22 motion, the ones that it claims are not -- have nothing to do  
23 with this case, those e-mails actually show exactly what Amazon  
24 was seeking -- excuse me, what Maglula is seeking. They're  
25 examples of how Amazon responds to counterfeiting reports,

1 examples of various escalation efforts that may or may not happen  
2 for complaints, and a key part of Amazon's argument in this case  
3 has been and will continue to be that they have policies in  
4 place, they are safeguarding against this type of stuff, and  
5 therefore what they do is reasonable.

6 Now --

7 THE COURT: The information that they provided you has  
8 shown you that?

9 MS. SMITH: To date, it does not. It shows how Amazon has  
10 responded to Maglula's complaints. Maglula cannot determine  
11 reasonableness in a vacuum, right?

12 THE COURT: So what are you seeking, how Amazon has  
13 reacted to every single complaint about counterfeiting made  
14 forever since the company was born?

15 MS. SMITH: No, that's not what the search term states.  
16 The search terms were targeted to individuals -- the individuals  
17 that we know who were staffed on Maglula's complaints, so we have  
18 narrowly selected custodians who we know what their job  
19 responsibilities are and who also were handling Maglula's  
20 matters. We have sought discovery from these individuals on how  
21 those individuals have responded to other complaints.

22 THE COURT: So, what are you looking for that they haven't  
23 given you?

24 MS. SMITH: Documents like what they attached -- I believe  
25 it's Exhibit 9 -- to their opposition. We show how the Amazon

1 employees who were responding to Maglula's complaints, how they  
2 reacted to --

3 THE COURT: -- {indiscernible} you're asking for more  
4 documents than what they have given you exist.

5 MS. SMITH: Because I -- they've represented that there  
6 are 67,000 documents responsive to the narrow search terms that  
7 Maglula proposed that they are not reviewing.

8 THE COURT: The explanation on why they haven't given you  
9 those documents?

10 MS. SMITH: Their explanation is that because Maglula's  
11 narrow search terms are not narrowed in the way that Amazon has  
12 proposed to Maglula's complaints about Maglula's products, that  
13 the search terms are overbroad.

14 THE COURT: And I'll let them answer this question,  
15 because if they thought the search terms provided by Maglula  
16 would elicit irrelevant information, then why did Amazon conduct  
17 a search of those terms in the first place? It seems like the  
18 most difficult part of the task has been done. If you like the  
19 search terms, you've gotten the hits, you know what the documents  
20 are, now all you have to do is to provide them. I'm confused as  
21 to why we're here. I mean, the bulk of the work has been done,  
22 to make a point.

23 MS. DEV: Your Honor, may I respond to that?

24 THE COURT: Of course you may.

25 MS. DEV: All right. This is Priyanka Dev on behalf of

1 defendants. Your Honor, the problem with these terms and the  
2 reason we agreed to other similar terms is that we believe -- the  
3 amount that is left in this case, although we have run the search  
4 terms and come up with the hit count and provided those hit  
5 counts on a per term basis, the reason it's problematic still is  
6 that Amazon has to review each of those hits, has to call on  
7 privilege to determine if there's privileged information,  
8 determine if there's third-party confidential information for the  
9 different products, different plans, different {indiscernible},  
10 different intellectual properties, and then process these --

11 THE COURT: -- everybody -- every attorney representing a  
12 client has the exact same obligation before producing a single  
13 document in a single case. Those are the rules.

14 MS. DEV: Yes, Your Honor, and --

15 THE COURT: Why shouldn't you have to go through that in  
16 this case, if everybody else has to go through it in their cases?

17 MS. DEV: Absolutely, Your Honor, we should go through  
18 that. On these particular hits, which are now -- the hit counts  
19 that we're talking about, over half of what we've already  
20 reviewed, produced, and provided to Maglula, now we're talking  
21 about over half of that, doing that again on these terms. But  
22 for these particular terms, they are producing excessive hit  
23 counts that are unmanageable and present an undue burden.

24 THE COURT: I'm confused on what you just said. What have  
25 you produced -- are you saying that what you've already produced

1 is part of what you acquired doing the search of the 16 -- that  
2 you got the 67,000 hits on?

3 MS. DEV: No, Your Honor. Let me step back and give you a  
4 little bit of context. To date Amazon has reviewed over 104,000  
5 e-mails and attachments that were based on 131 search terms that  
6 Maglula requested.

7 We negotiated the terms, we compromised on those terms,  
8 and we provided those. What Maglula is asking for now, on 10  
9 search terms, they're asking us for a quantity of 68,000 hit  
10 counts, and they're asking us to review and then {indiscernible},  
11 and the problem with these particular search terms is that  
12 they're bringing in excessive hits on a {indiscernible} basis.  
13 So this is where they {indiscernible} draw the line.

14 THE COURT: How do you deem something excessive if you  
15 haven't looked at it? If all 67,000 of those hits are the  
16 smoking gun that supports their claim, how are they excessive?

17 MS. DEV: Your Honor, we have had -- we had to look at  
18 them, right, because part of our obligation is to explain to  
19 Maglula, Hey, these six counts are non-responsive.

20 THE COURT: That's the part I wanted to make clear,  
21 because part of your argument was we have to go through this  
22 process and determine what's attorney-client privilege and what's  
23 this and {indiscernible}, but now you're representing to the  
24 Court that you've already looked at those documents.

25 MS. DEV: No, Your Honor. Let me clarify. We have not

1 looked at all 67,000 of those.

2 THE COURT: How many of them have you looked at?

3 MS. DEV: We looked at, I would say, in order to provide  
4 Maglula and the Court examples of non-responsive hits, I would  
5 say we looked at about 25 offenses.

6 THE COURT: 25 out of 67,000?

7 MS. DEV: Something on that order to come up with examples  
8 of why these are bringing in nonresponsive hits.

9 THE COURT: Well, how -- how did you only look at 25 hits  
10 if you were looking at hits that were the result of 131 search  
11 terms? That would suggest that you would be looking at least 131  
12 hits.

13 MS. DEV: Sure. I think there's a little bit of  
14 confusion. The 131 search terms that produced 104,000 documents,  
15 we have looked at every single one of those documents. We have  
16 reviewed them for privilege. We have reviewed them --  
17 {indiscernible}, and that is one thing. What is at issue here  
18 that Maglula's asking for and insisting upon is an additional  
19 68,000 hits over ten search terms. That is the bucket that  
20 Amazon has not -- that 68,000 hits, Amazon has not gone through  
21 page-by-page and reviewed because it's our position here, as has  
22 been presented, it's an undue burden to ask us to do that.

23 THE COURT: Why?

24 MS. DEV: On top of --

25 THE COURT: Why? If you looked at 131 search terms and

1 you found information, 104,000, whatever you said, and you  
2 produced that information to them, then obviously someone at  
3 Amazon made a determination that either we believe 104,000 based  
4 on 131 hits was relevant, or we deem it not too burdensome to  
5 give it to them, because you did. So now we're talking about  
6 talking about 67,000 when before you gave them 104,000, which 67  
7 is less. So how is that more burdensome?

8 MS. DEV: 67 -- Yeah, one point of clarification, Your  
9 Honor. We reviewed 104,000 documents.

10 Now, that doesn't mean that all of those documents are  
11 relevant that were provided to Maglula.

12 THE COURT: But if you can review 104,000 and that's not  
13 all that burdensome or too burdensome, because you didn't make  
14 that argument when you reviewed those 104,000, how is reviewing  
15 67,000 more burdensome than reviewing 104,000?

16 MS. DEV: Your Honor, it's unduly burdensome because of,  
17 one, where we are in the case. We know that discovery at this  
18 point in time should be over. A substantial {indiscernible} --

19 THE COURT: Well, why were we so slow then? Were the  
20 parties just not producing as quickly as they said or pursuant to  
21 the timeline that they, themselves, agreed to in the joint  
22 discovery plan?

23 MS. DEV: No, Your Honor. The problem is these terms that  
24 Maglula is asking for don't even comply with the discovery plan.  
25 The joint discovery plan specifies that e-mail discovery requests

1 have to be specific and address specific issues. So, the reason  
2 we haven't delved into --

3 THE COURT: Well, they say they are, and your argument is  
4 they are not. What we're here for is to determine who's right.

5 MS. DEV: Yeah, and, Your Honor, in response to that  
6 question, I want to pick up on a point that you made with  
7 opposing counsel. You said it would be untenable legal position  
8 for Amazon to argue that it has to be limited to Maglula's  
9 claims, but that's not Amazon's position. Amazon's position is  
10 that is one way of narrowing these terms, to provide responsive,  
11 relevant hits to Maglula that would not result in an undue burden  
12 to Amazon that would be proportionate to the needs of the case,  
13 and that is -- that is evidenced by the fact that for other  
14 custodians, the part of the 131,000 we've already run, the hit  
15 counts weren't that bad, weren't presenting an undue burden and  
16 we were able to --

17 THE COURT: Have you looked at the 67,000 hits to  
18 determine which one of those are about Maglula and which ones are  
19 about other parties or third parties?

20 MS. DEV: Your Honor, we have not reviewed every single  
21 one of those because that's --

22 THE COURT: Then how do you know if you're narrowing  
23 anything correctly? Because if you look at the 67,000 and  
24 64,000, viewing exactly what you believe is relevant, which is  
25 the counterfeiting of Maglula's products, then you give them the

1 64,000 and say the other 3,000 is not proportional because you  
2 already have 64,000 concerning Maglula that you know the case is  
3 about. But you cannot say that because you haven't even looked  
4 at them.

5 MS. DEV: Well, Your Honor, actually we can say that,  
6 because of the 104,000 documents that we did review where we  
7 allowed some of these terms to go through, in the spirit of  
8 compromise with Maglula, we said, all right, those are still  
9 bringing in hits, but we can deal with those other hits. We  
10 reviewed those documents. We can talk about review of those  
11 documents, but if they're not relevant to this case -- the  
12 term report, for instance --

13 THE COURT: In civil litigations, who makes relevance  
14 determinations except the Court?

15 MS. DEV: Yes, Your Honor. It's --

16 THE COURT: Relevance determinations are not unilaterally  
17 made by clients, unilaterally made by counsel, or bilaterally  
18 made between counsel. Relevance is determined by the Federal  
19 Rules of Civil Procedure, the local rules of this Court, and this  
20 Court.

21 MS. DEV: Yes, Your Honor.

22 THE COURT: So, if you look at the 104,000 and make a  
23 determination on which search terms were used that came up with  
24 the most irrelevant hits and then looked at the 67,000 and said,  
25 okay, we don't look at those ones we looked at in the 131 and

1 came up with 80 percent as irrelevant, we won't look at them, but  
2 we'll look at the other search terms that we used to come up with  
3 the 104,000, it came up with relevant hits and we'll do that same  
4 process with the 67,000.

5 MS. DEV: And, Your Honor, that is part of the process.  
6 We have taken the terms that we've already agreed on. These  
7 terms that are in the center of the group {indiscernible}, the 10  
8 terms, are the problematic terms, and for these particular  
9 custodians, they're even more problematic than the custodians  
10 that made the --

11 THE COURT: -- and you believe those terms came up with  
12 what you believe or deemed relevant information that you provided  
13 in the 104,000?

14 MS. DEV: Yes, Your Honor. I can't say that -- 104,000 --

15 THE COURT: -- {Indiscernible} -- that was a rhetorical  
16 question.

17 MS. DEV: Okay.

18 THE COURT: Because, obviously, out of 10 terms --

19 MS. DEV: -- absolutely --

20 THE COURT: -- some of the documents you provided in the  
21 104,000 were based on those 10 terms.

22 MS. DEV: Right, and it's certainly not our position --

23 THE COURT: -- and if all 10 terms would only produce  
24 irrelevant information because those same search terms produced  
25 at least some relevant information is what you produced in the

1 104,000.

2 MS. DEV: Yes, Your Honor. It's certainly not our  
3 position that these terms will not generate a single relevant  
4 piece of information. They --

5 THE COURT: -- if those terms could come up with more  
6 pertinent information. That's what the parties should have been  
7 discussing in the good faith meet and confer. We think that  
8 those 10 search terms come up with 80 percent irrelevant  
9 information. If they're irrelevant, you can dispute that, we can  
10 have a discussion about that, compromise on what both parties  
11 believe is relevant. So we both compromise on what we both  
12 believe is relevant, that narrows it down to 7 of the 10 terms,  
13 and we'll take those 7 terms and see how many hits they get, and  
14 then we'll have further discussion after that. That's how the  
15 process works.

16 MS. DEV: Yes, Your Honor, and that's the problem here.  
17 Maglula went ahead and filed a motion, and after -- before then,  
18 we had reached out and said, okay, let's -- give us some  
19 proposals for narrowing these terms that brings down our hit  
20 count. We've explained why they're bringing in excessive hit  
21 counts.

22 THE COURT: They didn't want to do that.

23 MS. DEV: They didn't respond to that e-mail, Your Honor.

24 THE COURT: Okay. Well, that, sadly to say, there may be  
25 a reason for that. That's why the local rules say that good

1 faith meet and confers should be held either in person or by  
2 telephone, because the Court's experience suggests that  
3 communicating via the written form, whether it be in letters or  
4 e-mails, doesn't resolve disputes.

5 MS. DEV: Yes, Your Honor. The last time the parties  
6 met --

7 THE COURT: -- so if they didn't return your e-mail, you  
8 picked up the telephone and called them, right? And said, we  
9 sent you an e-mail saying we'd like to participate in a process  
10 that will narrow the terms that will more succinctly acquire the  
11 information that is relevant to your claims and defenses and we  
12 will provide that, and they said, wonderful, let's do that.

13 MS. DEV: No, Your Honor, we did not call them and they  
14 did not call us. They ignored our e-mail entirely.

15 THE COURT: That's a good faith meet and confer.

16 MS. DEV: Yes, Your Honor. In this case, we don't believe  
17 that good faith -- the last time the parties talked over the  
18 phone about this issue was October 16th. That was a while ago  
19 during the discovery period in this case. We don't think that  
20 there was a --

21 THE COURT: Why did you think that 10 search terms are  
22 either irrelevant or would lead to information that's  
23 disproportionate to the claims or defenses?

24 MS. DEV: Your Honor, the only argument that we've heard  
25 from Maglula about the relevance of these particular terms is

1 that they claim that these terms are going to elicit information  
2 about willful and wrongful, {indiscernible} willful blindness,  
3 which is an element of contributory liability.

4 As Your Honor pointed out in *{indiscernible} versus Smith*,  
5 that is one particular element of one particular claim when  
6 Maglula has alleged eight different claims all of which have  
7 various subparts. That proportionality burden puts the -- puts  
8 the proportionality standard on its head. But, more importantly,  
9 the contributory reliability analysis requires the Court or the  
10 jury to ask whether the alleged offender, which is Amazon, knew  
11 or should have known about the particularized infringement in  
12 this case.

13 So, Maglula's argument that documents about products --  
14 other products and end responses to other complaints about prior  
15 liability, compliance, counterfeiting, their point that those are  
16 relevant doesn't link up with the actual standard {indiscernible}  
17 for liability.

18 THE COURT: That's not true. Relevance is a determination  
19 for the trier of fact. Simply because you deem it not necessary  
20 or not relevant or they deem it relevant is -- excuse the pun --  
21 irrelevant, because neither you nor her would be on the jury, if  
22 it's a jury trial; you won't be the judge presiding over the  
23 matter if it's a bench trial. So you really can't say that the  
24 information that you have shows that Amazon had particularized  
25 knowledge based on -- let's say there are a hundred people

1 complaining about that method of counterfeit or contributing to  
2 counterfeiting, and they had complaints from 99 other companies  
3 and they did little or anything to combat it, couldn't suggest to  
4 a trier of fact that, if they had knowledge of 99 other companies  
5 complaining of counterfeit or contributing to counterfeiting on  
6 Amazon's sites, then it may be more likely than not that they had  
7 information that Amazon knew or should have known of, it was  
8 contributing to counterfeiting of Maglula's products.

9 MS. DEV: Your Honor, the standard in this case -- and  
10 this is in the eBay case, it makes it clear, while I agree with  
11 you that it is up to the trier of fact to determine the  
12 relevance, the standard for contributory liability is liability,  
13 is specific to the products at issue, the intellectual property,  
14 and the alleged infringing --

15 THE COURT: -- to the product at issue, but you can  
16 utilize indirect circumstantial evidence to get that  
17 particularity. Why do you think in, say, discrimination cases,  
18 for example, they're allowed by law to use a pattern of  
19 discrimination to support that that company discriminated against  
20 this particular person. Circumstantial, indirect evidence can be  
21 used to satisfy the elements of the claims in a particularized  
22 manner.

23 MS. DEV: Yes, Your Honor --

24 THE COURT: And what you're trying to try to argue is that  
25 only direct evidence can be used to do that.

1                   MS. DEV: No, Your Honor, not exactly. There's two points  
2 I want to make in response to that, which I think is a valid  
3 point. First, the -- in this particular case, as Maglula's  
4 complaint demonstrates, Amazon and Maglula worked for three years  
5 together collectively about the problems and the complaints that  
6 Maglula had. Unlike some of the cases that Maglula is relying on  
7 where knowledge of other infringing acts might be relevant or  
8 admissible where, for example, the *{indiscernible}* case that Your  
9 Honor may be familiar with, there's no issue here. There's no  
10 triable issue here of whether or not Amazon failed to act, that  
11 Maglula may have a problem with whether Amazon's responses to the  
12 actions were reasonable, but that -- there's no triable issue  
13 here of whether Amazon failed to act per the defendant's  
14 *{indiscernible}*, and that it was willfully blind to Maglula's  
15 complaints.

16                   What Amazon -- what Maglula had an issue with was the  
17 reasonableness of that, which is a different situation. In the  
18 *{indiscernible}* case, the defendant, the alleged infringer, had  
19 centrally rejected the idea that it failed to act. There was --  
20 it's -- there was evidence that it failed to act, that it did  
21 nothing. Here that's not the case. And more probative than  
22 that, Your Honor, to the proportionality concern here, even if  
23 there's one particular -- even if Your Honor believes that, you  
24 know, this is relevant to whether they knew or should have known  
25 and this is, you know, circumstantial evidence in the

1 {indiscernible}, then we turn to the proportionality concerns.  
2 Even if it's relevant, there's other evidence, other documents  
3 that Amazon produced about this. Amazon has produced many  
4 documents about its anticounterfeiting measures. Maglula can  
5 take issue with that and show the jury why those measures are --

6 THE COURT: That information is to your advantage, the  
7 defendant; not that they are to the plaintiff.

8 MS. DEV: Well, it's relevant to the inquiry of whether  
9 Amazon was willfully blind.

10 THE COURT: It's relevant to your defense of that element,  
11 not to their proving that element that you were knowledgeable and  
12 willfully blind. The fact that you had put in place all these  
13 counter, anticounterfeiting policies doesn't help them prove  
14 their case, it helps you defend yours.

15 MS. DEV: Yes, Your Honor, but let's talk about -- even  
16 further, even if you believe that, Your Honor, which I do think  
17 is a valid point, even if you believe that, as we saw in  
18 Exhibit 9 to our opposition, these were particularized e-mails  
19 about very particular products, sometimes having nothing to do  
20 with counterfeiting; qualified product issues; product compliance  
21 issues; whether a listing has the incorrect titles; whether the  
22 reported condition of a sweater was the right reported condition;  
23 whether an item was marked as used when it was actually new or  
24 vice versa.

25 THE COURT: And so, after reviewing that information, you

1 got on the phone with opposing counsel and said, this is why we  
2 believe it's disproportionate and unduly burdensome, because here  
3 some of the information that that search is missing, something  
4 about using, something about the color or whatever of this  
5 sweater, and y'all had a conversation about that, and they said,  
6 yeah, we kind of agree with that, that type of stuff really  
7 doesn't go to that element of the claim, so we don't want any of  
8 that kind of information. So that conversation occurred, right?

9 MS. DEV: Your Honor, we definitely explained to Maglula  
10 repeatedly that it's bringing in non --

11 THE COURT: A good faith meet and confer would be more  
12 specific and particularized because you would provide them  
13 additional information upon which they can form a legitimate  
14 conclusion that you're right, and that you're just not  
15 representing the best interest of your client, that you're  
16 providing information that they also would use or think is  
17 relevant to them helping them to prove their claims. But I'm  
18 glad you got back to proportionality, because it's kind of hat in  
19 hand with unduly burdensome.

20 So -- but I haven't gotten the definition -- the law is  
21 clear on that fact. Unduly burdensome has to be specific.  
22 Affidavit this and that. So, how much money did it cost to go  
23 through that process with the 67,000 hits? How much time and  
24 effort? How many personnel did you place on it? How many hours  
25 did those personnel spend doing that rather than doing other work

1 for Amazon which Amazon could make a profit? That's the type of  
2 information that you're required to provide the Court for the  
3 Court to make a determination on that -- whether their request of  
4 unduly burdensome or not is therefore proportionate or  
5 disproportionate to the needs of the Court.

6 MS. DEV: Yes, Your Honor. Having addressed that in  
7 Exhibit 5 our opposition, we included a table that not only shows  
8 the hit counts but also the gigabytes of data that we got, and,  
9 maybe even more importantly to your point, Your Honor, the number  
10 of hours on a per custodian or per employee, these are the terms  
11 that Maglula has signified, how many hours it would take Amazon  
12 to review those hits, and that's a per-person basis.

13 And so the total there, if you look at Exhibit 5, and I'm  
14 happy to just tell you the total there is 1724 hours, that is a  
15 large amount of hours. Again, that's on a per-person basis, but  
16 we divide that over a review team of, let's say, 30 reviewers.  
17 It takes, you know, a couple of weeks to get through it,  
18 perhaps -- I haven't done the math exactly, but I think it's  
19 going to take a matter of a week or so, but that's a lot of  
20 reviewers. That's a lot of manpower that --

21 THE COURT: It's a great amount of work in a -- how long  
22 was the discovery process in this case?

23 MS. DEV: Your Honor, fact discovery ends on the 30th of  
24 November, and I believe it started in late August.

25 THE COURT: When did it start?

1 MS. DEV: I believe it started in late August --  
2 {Indiscernible}.

3 THE COURT: {Indiscernible} of fact discovery? One week  
4 of review is unduly burdensome in a two-and-a-half month fact  
5 discovery process, is what you're saying?

6 MS. DEV: Your Honor, it -- I want to be clear. There are  
7 early reviewers that would have to be tasked with these -- the  
8 number of reviewers that Amazon would have to task with this is a  
9 large amount.

10 THE COURT: That's 1700 hours. That's 1700 hours per  
11 reviewer?

12 MS. DEV: No, it's 1700 hours to get through all of this  
13 data on a per person basis, so 1700 hours that --

14 THE COURT: -- so a week and a half. A week and a half of  
15 their time and effort reviewing and a two-and-a-half month fact  
16 discovery process is what you deem unduly burdensome.

17 MS. DEV: Being unduly burdensome and not proportional,  
18 given the discovery that we've provided, Your Honor.

19 THE COURT: Well, so you -- y'all couldn't come up with a  
20 compromise to say, okay, we'll give you that type of information  
21 concerning not only Maglula, since that's particularized to the  
22 clients in this claims in this case, but to other third party  
23 parties or complainants and say, okay, well, we got ours plus we  
24 got some support hours, we're done?

25 MS. DEV: Your Honor, we didn't come up with that

1 compromise because Maglula -- Maglula is seeking a sweeping -- a  
2 sweeping discovery of all products in all --

3 THE COURT: They can't get sweeping discovery. I make  
4 that clear every Friday. I mean, we've been here more than one  
5 Friday. Maybe I didn't make it clear. I mean, you know, this  
6 Court's definition of good faith meet and confers which goes to  
7 help narrow proportionality and benefits and costs in a case, is  
8 that good faith meet and confers during a settlement conference  
9 is about compromise. Nobody leaves a good faith meet and confer  
10 completely happy, just like settlements. No one should walk into  
11 a good faith meet and confer with the attitude or philosophy,  
12 it's my way or the highway; take it or leave it; this is what I'm  
13 offering, you give it to me or I'm walking. That's not a good  
14 faith meet and confer.

15 So, when you say they refused to narrow the -- that's an  
16 issue. That's a basis for this Court to deny your motion  
17 outright for failure to follow the local rules in meeting and  
18 conferring in good faith because --

19 MS. DEV: -- Your Honor --

20 THE COURT: -- because the law provides for that  
21 alternative as well.

22 MS. SMITH: Your Honor, if I may address that point. We  
23 spoke with Amazon counsel in the course of several weeks  
24 regarding the search terms. We talked to them on the phone on  
25 October 16th. They gave us the hit count for our original search

1 terms. I immediately advised them of certain terms that I knew  
2 given the low hit counts that they had returned, numbers such as  
3 2 and 19, et cetera, that we would not be narrowing those terms  
4 because we didn't believe that hit counts of that nature to be  
5 unduly burdensome.

6 We then exchanged substantial e-mails regarding the back  
7 and forth of these terms, which I do believe is appropriate in  
8 this case given the complexities of the search terms that we  
9 proposed. Maglula has narrowed, has utilized {indiscernible}  
10 structures. We communicated those narrowing proposals to Amazon.  
11 And then last week we get an e-mail from Amazon that says these  
12 are the search terms we're running.

13 THE COURT: All I keep hearing is e-mails.

14 MS. SMITH: We were on the phone, and then moved to e-mail  
15 given, again, the {indiscernible} in the briefing, right, all of  
16 the terms involved -- from the connectors within certain of  
17 these, these terms and this, and my belief is that it was more  
18 effective to put that in writing so that everybody could see what  
19 search terms we were proposing that Amazon run, and Amazon had  
20 counter proposals, including those in writing to us.

21 THE COURT: Then when you got on the phone with them and  
22 said, we believe these are not disproportionate or unduly  
23 burdensome because those two terms got 2 hits and 19 hits based  
24 on your previous production, so that's what we based our  
25 determination that using those 2 terms, at the very least, would

1 not be unduly burdensome or disproportionate. That's what you  
2 said to them on the telephone. And they said, Gee, 2 and 19? We  
3 can understand that, we agree.

4 MS. SMITH: Right. And every step of the way, you can see  
5 through the way the e-mail correspondence have played out, we  
6 have proposed terms; Amazon did come back and accept the  
7 revisions for some of those. Every step of the way we have been  
8 narrowing these issues, and both sides have been -- as you said,  
9 nobody has left happy.

10 THE COURT: But they're not narrowed enough, it appears.

11 MS. SMITH: No, because last week we got an e-mail from  
12 Amazon saying these are the search terms we are running, and we  
13 are at a fundamental impasse on whether or not the search terms  
14 need to be limited to Maglula's complaints about Maglula's  
15 products. Amazon's position on that has not changed. The first  
16 time --

17 THE COURT: -- the Court has. You will give them  
18 information concerning at least a couple of other third-party or  
19 people who sell or whatever on Amazon. It needs to be four  
20 others besides Maglula products, various. Go back to the 67,000  
21 hits. That's a compromise. If there are 60 others they're  
22 complaining about and you only have to give them information  
23 concerning 3 or 4, that's a compromise.

24 MS. SMITH: I just want to clarify something. Someone  
25 else complaining about Maglula's products?

1                   THE COURT: The information they said that they provided  
2 Maglula -- you have made the argument that this is why it helps,  
3 it assists us in proving the element of contributory negligence,  
4 the fact that you knew or they had knowledge of complaints about  
5 counterfeiting, efforts they took to resolve those complaints,  
6 therefore, if they knew and did nothing, no effort to resolve, or  
7 they did -- you deem were insufficient, after they did and they  
8 provided you all of that information concerning Maglula, then by  
9 that same type of information concerning three or so other people  
10 who have complained about counterfeiting of their products, not  
11 Maglula's {indiscernible} or whatever you want to call it.

12                   Because without it, we just -- maybe it just wasn't  
13 Maglula. Maybe Maglula just said this. But if there's  
14 information to suggest that other people were complaining about  
15 the same thing about their products that Maglula is now  
16 complaining about here about theirs, provide generally, logically  
17 speaking, makes it more likely than not, maybe, that a trier of  
18 fact could conclude that this was going on with Maglula as well.  
19 That's like you bringing other information to support your own  
20 client's words rather than just your client's testimony. It's  
21 always good to have something else to support it.

22                   MS. DEV: Your Honor, may I just respond to that with just  
23 one point with the Court's indulgence?

24                   THE COURT: You may.

25                   MS. DEV: Your Honor, in their reply -- the compromise is

1 an interesting one to me, because in their reply, and I hate to  
2 read parts of the brief, but they say that Maglula should be able  
3 to test Amazon's reasonableness argument against Amazon's  
4 {indiscernible} policies and how Amazon responds to such other  
5 complaints. In a footnote, footnote 3 of page 5 of their brief,  
6 they state "Amazon has already produced some such documents,  
7 including e-mails." So, I wanted to get clear. I'm happy to  
8 have the Court compromise, and we're amenable to that, but I want  
9 to make it clear what Amazon has done with those documents and --

10 THE COURT: What have they provided concerning that and  
11 why do you deem it insufficient? Or are you looking for all  
12 again? Because you're not getting all.

13 MS. DEV: Right, and I would like to take a step back and  
14 talk about the fact that Maglula propounded search terms in a way  
15 that the parties agreed to in this case, which was 10 search  
16 terms per custodian identified, so --

17 THE COURT: What information are they referencing in that  
18 complaint in that footnote that they have provided you, and why  
19 do you deem it insufficient?

20 MS. DEV: They have given us, I would say, some examples  
21 from certain custodians, not the custodians that we propounded  
22 and not necessarily -- and again, these are people who were  
23 tasked with reviewing --

24 THE COURT: -- If the factual underpinnings of what  
25 occurred, what they did in response to complaints about

1 counterfeiting are the same, what difference does it make what  
2 file, what custodian's file that came out of? You're not really  
3 using -- if it's one of their own people, you have the argument,  
4 whether that person works in cubicle A or cubicle C, the argument  
5 is the same. They knew about it, therefore the company knew  
6 about it, therefore they were willfully blind in ignoring what we  
7 told them, the same way they were willfully blind in ignoring  
8 these other four, three or four companies about the  
9 {indiscernible} counterfeited products on their side.

10 MS. SMITH: My concern is that this allows for an element  
11 of cherry-picking. They have produced e-mails from certain  
12 custodians relating to complaints of counterfeiting; they have  
13 not for others.

14 THE COURT: So they will provide those three or four that  
15 I am talking about from three or four custodians that they have  
16 not provided yet.

17 MS. SMITH: There are, I believe, seven or eight  
18 custodians at issue in this motion.

19 THE COURT: And so you're looking for all seven or eight  
20 after I just said you're not getting all?

21 MS. SMITH: They're going to label it that Maglula  
22 propounded its search terms, that that is what we requested, and  
23 the --

24 THE COURT: For the same information provided, then, in  
25 regards to what you've already provided. You will provide that

1 same information concerning four other custodians.

2 MS. SMITH: And who gets to pick those custodians?

3 THE COURT: What better way do you have to pick them?

4 Pick -- this is becoming way more -- this is really putting the  
5 Court in the minutia of it? Put seven names on a list, put them  
6 on a piece of paper, put them in a hat and draw them. Really?  
7 This is what the Court has gotten down to? We are that  
8 mistrusting of opposing counsel that we can't believe -- someone  
9 with a legitimate process of picking four out of seven or eight  
10 names?

11 MS. SMITH: I think we can make that work, Your Honor.

12 THE COURT: You will make it work.

13 MS. SMITH: Understood.

14 MS. DEV: Your Honor, could I just clarify your order to  
15 make sure I understand it?

16 THE COURT: Yes.

17 MS. DEV: Okay. There's a lot of moving parts with  
18 custodians and terms. So, the terms that are at issue for the  
19 motion cover a number of different custodians. We've already  
20 provided three on the -- you know, three on 15 different  
21 custodians for 131 terms. Are you asking the parties to focus  
22 their searching on three or four of these remaining terms and  
23 come to agreement on that? I want to understand your order on  
24 that, because it's not on a per-custodian -- the point is, if  
25 we've only provided those types of e-mails for some custodians

1 and we're refusing to provide them on others --

2 THE COURT: -- well, why didn't you --

3 MS. DEV: -- so that --

4 THE COURT: -- mention that issue here, there are seven or  
5 custodians?

6 MS. DEV: There are three -- yes, there are eight  
7 custodians at issue, and your order is that we confer about some  
8 of those custodians, three to four business custodians.

9 THE COURT: Whatever information you provided and she  
10 said, they've already provided that information for some,  
11 whatever search you did to be able to provide that information  
12 concerning some, you will do the same thing concerning four  
13 others.

14 MS. DEV: Okay. I think I understand the Court's order.

15 THE COURT: When -- when did we say fact discovery would  
16 close?

17 MS. SMITH: November 30th, Your Honor.

18 THE COURT: All right. Well, before I --

19 MS. SMITH: November 30th. I don't know if we put out --

20 THE COURT: Well, are there other issues in dispute?

21 MS. DEV: Nothing from the defendants, Your Honor.

22 MS. SMITH: I'm checking really quickly. Nothing further  
23 from plaintiff.

24 THE COURT: All right. The defendants, how long do you  
25 think you need to go through that process and provide that

1 information?

2 MS. DEV: Your Honor, assuming that the parties can  
3 somewhat confer and we're on the same page on what we're  
4 providing, I think by the 16th of November would be a reasonable  
5 timeframe, which is a week from now.

6 THE COURT: Do you have any problems with that?

7 MS. SMITH: My concern is that we are -- we have only a  
8 few weeks left in fact discovery, and if we're just getting  
9 documents with two weeks left --

10 THE COURT: -- well, I'd think you'd want to --

11 MS. SMITH: -- prior the taking depositions --

12 THE COURT: -- get this done as quickly as possible so the  
13 Court doesn't have to hear a motion concerning extensions because  
14 of the fact of the holiday.

15 MS. SMITH: Right.

16 THE COURT: So, it appears to the Court that sooner will  
17 be better than later. Sooner would not involve your Thanksgiving  
18 plans and sooner would be faster, given your time before the  
19 discovery cutoff.

20 MS. SMITH: Yes. I would propose what we did in our  
21 initial order, so within five business days, which would be the  
22 11th.

23 THE COURT: What initial order?

24 MS. SMITH: The initial proposed order that we provided  
25 with this motion, which suggested five days.

1 THE COURT: Is that calendar days?

2 MS. SMITH: Yes.

3 THE COURT: So, you want them to work over the weekend,  
4 too? Are you working over the weekend?

5 MS. SMITH: I am, Your Honor.

6 MS. DEV: Your Honor, we've requested -- just -- in the  
7 spirit of compromise, Your Honor, we request until next Friday,  
8 which gives us a week to take the hit counts that we're talking  
9 about here, make sure we are on the same page. I want to make  
10 sure we're on the same page as plaintiff. {Indiscernible} and  
11 produce them by the five days.

12 THE COURT: Okay.

13 MS. DEV: Thank you, Your Honor.

14 THE COURT: Anything further?

15 MS. SMITH: Nothing from plaintiff.

16 MS. DEV: Nothing from defendants. Thank you, Your Honor.

17 THE COURT: Thank you.

18 (Proceedings adjourned at 12:52 p.m.)

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**C E R T I F I C A T E**

1  
2 I, Scott L. Wallace, RDR-CRR, certify that  
3 the foregoing transcript of proceedings was prepared from  
4 an FTR Gold audio recording of proceedings in the  
5 above-entitled matter and was produced to the best of my  
6 ability. Indiscernible indications in the transcript  
7 indicate that the audio captured was not clear enough for  
8 this reporter to attest to its accuracy.

9  
10 /s/ Scott L. Wallace  
11 -----  
12 **Scott L. Wallace, RDR, CRR**  
13 **Official Court Reporter**

14 1/13/21  
15 -----  
16 **Date**  
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